Statutes—Continued

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):
Sec. 273
Sec. 273(a)
Sec. 275
Sec. 276
Sec. 276(a)
Sec. 276(c)
Sec. 3746
Sec. 3760
Sec. 3761

tiorari was filed on April 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the court below erred in affirming the district court's determination that taxpayer had failed to pay $18,957.90 of his 1942 federal income tax liability and that the government was not barred from collecting that amount plus interest in this action.

STATUTES INVOLVED

Section 6(a) of the Current Tax Payment Act of 1943 and Sections 273(a), 275(a), 276(a) and (c), and 3746(c), 3760, and 3761 of the Internal Revenue Code of 1939 are set out in pertinent part in the Appendix, *infra*, pp. 8-10.

STATEMENT

In 1943, taxpayer filed a timely return for the calendar year 1942, revealing a federal income tax liability in the amount of $37,915.81. That amount was assessed on June 4, 1943. Only 50% of the assessment was paid, while the remaining 50%, or $18,957.90, was supposedly discharged pursuant to the forgiveness provision in Section 6(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, 26 U.S.C. 1946 ed., Sec. 1622, note, which became effective as of September 1, 1943.[1] Subsequently, it was

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[1] As the court of appeals noted (Pet. App. 2a), the Current Tax Payment Act changed the income tax collection system from one under which payments were made in the current year for the preceding year's tax liability to one under which payments were to be made currently on a

discovered that taxpayer committed fraud in his 1942 return. On November 21, 1951, a jeopardy assessment followed by a 90-day deficiency notice on December 14, 1951, was made against the taxpayer for the years 1942 to 1947 in the total amount of $205,610.44 which was paid in full. Included in this assessment was a deficiency in tax for the year 1942 in the amount of $4,574.62 and a 50% fraud penalty for the same year in the amount of $2,287.31. By the express terms of Section 6(a), taxpayer's fraud rendered the forgiveness feature of the Act inapplicable; the unpaid portion ($18,957.90) of his 1942 taxes as originally reported by him had therefore been improperly discharged. This amount was reassessed on May 2, 1952, and the present action by the United States seeking collection of the unpaid 1942 taxes as reassessed was brought on May 1, 1958. (R. 1-5; Pet. App. 2a-5a.)

The district court found that the remaining 50% portion of the 1942 taxes, *i.e.*, $18,957.90, had never been paid by the taxpayer; that payment of a deficiency and additions to tax for fraud for the year 1942 based on the jeopardy assessment of November 21, 1951, and the deficiency notice of December 14, 1951, did not constitute an accord and satisfaction preventing the further assessment of amounts owed for 1942; and that the reassessment for unpaid taxes was not barred by the statute of limitations when made on

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pay-as-you-go basis. In order to avoid a double tax burden on taxpayers in the year of transition, Congress provided in Section 6(a) of the Act for the discharge under certain circumstances of a substantial portion of the tax liability otherwise due for the year 1942.

May 2, 1952 (R. 5-6). The court of appeals affirmed (Pet. App. 8a-18a).

ARGUMENT

The decisions below are correct; there is no conflict of decisions; further review by this Court is unwarranted.

1. (*a*) The taxes here in issue for 1942 were first assessed on June 4, 1943, but, pursuant to Section 6(a) of the Current Tax Payment Act of 1943 (App., *infra*, pp. 8-9) which became effective as of September 1, 1943, three-fourths of the assessment was forgiven. Subsequently, it was discovered that taxpayer had filed a fraudulent return for 1942; the forgiveness feature of the Act was therefore not applicable to him. Both the district court and the court of appeals held that the six-year statute of limitations (Sec. 276(c) of the Internal Revenue Code of 1939, App., *infra*, p. 10) did not preclude reassessment of the erroneously forgiven portion of the 1942 tax once fraud was discovered and that the amount unpaid was properly reassessed on May 2, 1952. The court of appeals stated (Pet. App. 14a-15a) that,

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Taxpayer renews his contention made in the two courts below that the taxes here in issue for 1942 have already been paid in full (Pet. 6). Both the district court and the court of appeals thoroughly considered this question (R. 2-5; Pet. App. 2a-8a). On the basis of undisputed subsidiary findings, the district court found that the taxes in question have not heretofore been paid, and the court of appeals agreed in a detailed analysis of the assessments against, and the payments made by, the taxpayer for the years 1942 and 1943 (Pet. 6a-8a). No showing of error has been made by the taxpayer, and the conclusion concurred in by the two lower courts is now entitled to finality. See *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51.

if the period of limitations began to run on the date of the original assessment in 1943, a taxpayer filing a fraudulent return would receive the benefit of the forgiveness provision if he were skillful enough to conceal his fraud for six years, even though by the express terms of the Current Tax Payment Act he would not be entitled to the benefit. This result was properly rejected by both courts below, for it is clearly incompatible with the Act and with Section 276(a) of the 1939 Code (App., *infra*, pp. 9-10), which provides in case of fraud for assessment, or for collection without assessment, at any time.[1]

(*b*) Contrary to taxpayer's contention (Pet. 8-12), the decision below is not in conflict with this Court's holdings in *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, and *United States* v. *Updike*, 281 U.S. 489. As the court of appeals noted (Pet. App. 17a), these cases deal with the congressional policy manifested by the statute of limitations on the collection of old taxes, but are not directed to the situation in the present case in which taxpayer's own fraud prevented the collection of the taxes in issue within the normal statutory period. The decisions below are in accord with the general principle of

[1] Taxpayer's concern (Pet. 2, 7, 10, 11-12) that, by virtue of the decisions below, the large amount of tax forgiven pursuant to the Current Tax Payment Act would be removed from the protection of the statute of limitations is misplaced. The vast majority of taxpayers attempt to pay their lawful tax, and deficiencies on their returns are due to honest errors. Only that small number of taxpayers who engaged in fraud to deprive the government of its revenue are affected by the holdings below.

equity that a party may not utilize the defense of a statute of limitations when he prevented the other party from taking appropriate action prior to the termination of the statutory period. Cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61; *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-233.

2. Section 273(a) of the Internal Revenue Code of 1939 (App., *infra* p. 9), which provides that the assessment of a deficiency may be made immediately if the delay occasioned by following the normal deficiency procedures would jeopardize the assessment or collection of the deficiency, does not preclude further assessment of additional taxes found to be owing. The two lower courts held that the further assessment for 1942 taxes still owing was proper even though an assessment for 1942 taxes and additions to tax because of fraud had been made on November 21, 1951. This holding is in accord with this Court's decision in *Botany Mills* v. *United States*, 278 U.S. 282. Accord, *Burnet* v. *Porter*, 283 U.S. 230; *Page* v. *Lafayette Worsted Co.*, 66 F. 2d 339 (C.A. 1st), certiorari denied, 290 U.S. 692; *McIlhenny* v. *Commissioner*, 39 F. 2d 356 (C.A. 3d); *L. Loewy & Son* v. *Commissioner*, 31 F. 2d 652 (C.A. 2d).

Taxpayer also contends (Pet. 11) that the decision below is in conflict with the district court holding in *Curd* v. *United States* (S.D. Fla.), decided December 6, 1957 (1 A.F.T.R. 2d 678), reversed on another ground, 257 F. 2d 347 (C.A. 5th), certiorari denied, 358 U.S. 920. In *Curd*, however, the district court indicated that there was not sufficient proof of fraud, and its decision turned on that point.

Moreover, as the court of appeals held, there was no binding agreement between taxpayer and the government as to his 1942 tax liability merely because he paid a jeopardy assessment for that year, since the statutory requisites for a closing agreement or compromise (Sections 3760 and 3761 of the Internal Revenue Code of 1939, Apps. *infra*, pp. 11-12) were not fulfilled.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, 145:

Sec. 6. RELIEF FROM DOUBLE PAYMENTS IN 1943.

(a) *Tax for 1942 Not Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than a nonresident alien not subject to the provisions of sections 58, 59, and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source) is not greater than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942 (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable

year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud.

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(26 U.S.C. 1946 ed., Sec. 1622, note.)

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

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SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

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SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for

the collection of such tax may be begun without assessment, at any time.

* * * *

(c) *Collection After Assessment.*—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

SEC. 3746. SUITS FOR RECOVERY OF ERRONEOUS REFUNDS.

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(c) *Refunds Based on Fraud or Misrepresentation.*—Despite the provisions of subsections (a) and (b) such suit may be brought at any time within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

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SEC. 3760. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) *Finality.*—If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant

Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

(b) *Record.*—Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

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